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Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 200

CHRISTOPHER JACKMAN, *et al.*,

—v.—

JOHN M. BODINE, *et al.*

THE ELIZABETH DAILY JOURNAL, *et al.*,

—v.—

ROBERT J. BURKHARDT, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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TABLE OF CONTENTS

	PAGE
PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY	1
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
PRELIMINARY STATEMENT	4
STATEMENT OF THE CASE	5
POINT I—The decisions of this Court in Kirkpatrick v. Preisler and Wells v. Rockefeller elucidating the one man, one vote rule have binding application to state apportionment, and therefore Article 4, Section II, paragraphs 1 and 3 of the New Jersey Constitution are invalid	7
POINT II—Assuming that Kirkpatrick and Wells do not apply to state apportionment and that there are rational state policies justifying the deviations, the population deviations authorized by the New Jersey Constitution, Article 4, Section II, paragraphs 1 and 3 exceed the limits permitted by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution	14
POINT III—The population deviations of the New Jersey state apportionment plan cannot be justified by rational state policies as required by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution	16

PAGE

POINT IV—The multi-member Senate districting plan authorized by the New Jersey Constitution Article 4, Section II, paragraph 1 is violative of the Constitution of the United States 21

CONCLUSION 27

APPENDIX:

A—Opinion of the Supreme Court of New Jersey 1a

B—New Jersey Assembly District Populations 1968-1969 and 1970-1971 ..... 18a

C—Statistical Appendix on Behalf of the State of New Jersey to Supplemental Brief for the Apportionment Commission 23a

Table C—(Demonstrations of Alternate Senate Districts Using Estimated 1970 County Populations) 26a

D—Affidavit of James B. Weaver 28a

Cases Cited

Abate v. Mundt, 25 N. Y. 2d 309, 253 N. E. 2d 189 (Ct. App. 1969), cert. granted, —— U. S. ——, 25 L. Ed. 26, 90 Sup. Ct. 929 (Feb. 24, 1970) 13, 14, 24

Burns v. Richardson, 384 U. S. 73, 88 (1966) 22, 23

Chavis v. Whitcomb, 305 F. Supp. 1364, (S.D. Ind. 1969), prob. jurisd. noted, 38 U.S.L.W. 3369 (3-24-70) 24

Eubanks v. Louisiana, 356 U. S. 584, 587-88 (1958) 26

Fortson v. Dorsey, 379 U. S. 433 (1965) 21-24, 26

Gaston County v. United States, 395 U. S. 285, 293 (1969) 26

PAGE

Glasser v. United States, 315 U. S. 60, 86 (1942) 26

Gomillion v. Lightfoot, 364 U. S. 339 (1960) 26

Griffin v. Illinois, 351 U. S. 12 (1956) 26

Hadley et al. v. The Junior College District of Metropolitan Kansas City, Missouri et al., —— U. S. ——25 L. Ed. 2d 45, 90 S. Ct. 763 (1970) 19

Harman v. Forssenius, 380 U. S. 528, 537 (1965) 17

Harper v. Virginia State Board of Elections, 383 U. S. 663 (1966) 26

Hernandez v. Texas, 347 U. S. 475, 482 (1954) 26

Hill v. Texas, 316 U. S. 400, 404 26

Jackman v. Bodine, 53 N. J. 585 (1969) cert. denied 396 U. S. 822 (1969) 11, 12fn, 15, 17-19, 23

Johnson v. Virginia, 373 U. S. 61, 62 (1963) 26

Kilgarlin v. Hill, 386 U. S. 120 (1967) 15, 16, 23

Kirkpatrick v. Preisler, 394 U. S. 526 (1969) 2, 6-12, 12fn, 13, 14, 17, 18

Klahr v. Williams, 303 F. Supp. 224 (D. Ariz. 1969) 13

Kramer v. Union Free School Dist., 395 U. S. 621, 627 (1969) 17

Lucas v. Forty-Fourth General Assembly of Colo., 377 U. S. 713, 735, footnote 27 16

Mann v. Davis, 245 F. Supp. 241, 245 (E.D. Va.), aff'd sub nom Burnette v. Davis, 382 U. S. 42 (1965) 22

Nixon v. Condon, 286 U. S. 73 (1932) 26

Reynolds v. Sims, 388 U. S. 533, 577 (1964) 7-10, 12, 14-17, 19, 20, 22, 23

PAGE

Schaeffer v. Thomson, 251 F. Supp. 450, (D. Wyo. 1965), aff'd sub nom Harrison v. Schaeffer, 383 U. S. 269 (1966) 22

Smith v. Texas, 311 U. S. 128, 132 (1940) 26

Soc. Labor Party v. Rhodes, 290 F. Supp. 983 (1968) aff'd 393 U. S. 23 (1968) 17

Swann v. Adams, 385 U. S. 440 (1967), 394 U. S. at 532 ..... 9, 11, 16, 20

Terry v. Adams, 345 U. S. 461 (1953) 26

Wells v. Rockefeller, 394 U. S. 542 (1969) 2, 7, 8, 10-12fn, 13, 14, 17, 20

Wesberry v. Sanders, 376 U. S. 1, 7-8 (1964) 7, 8, 17

Wright v. Rockefeller, 376 U. S. 53 (1964) 22fn

United States Constitution Cited

Fourteenth Amendment 2, 3, 7, 14, 16, 26

Fifteenth Amendment 3, 26

New Jersey Constitution Cited

Article 4, Section II, Paragraphs 1 and 3 ..... 2, 7, 14, 19, 21

Statute Cited

28 U.S.C. §1257(3) 2

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PAGE

10 Wm. & Mary L. Rev. 888, 903 (1969), Dixon & Hatheway, The Seminal Issue in State Constitutional Revision: Reapportionment Methods and Standards 24

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Jersey entered on March 2, 1970, and reported at 55 N. J. 371, 262 A. 2d 389 (1970).

Opinions Below

The opinion of the Supreme Court of the State of New Jersey is set forth in the Appendix, *infra*. It is the eighth of a series of opinions by the New Jersey Supreme Court since 1964 in *Jackman, et al.* v. *Bodine, et al.* The first

decision is reported at 43 N. J. 453; subsequent opinions are reported at 43 N. J. 491, 44 N. J. 312, 44 N. J. 414, 49 N. J. 406, 50 N. J. 127 and 53 N. J. 585.

Jurisdiction

The decision of the New Jersey Supreme Court denying the relief sought in this case is dated March 2, 1970. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

Questions Presented

1. Whether the cases of *Kirkpatrick* v. *Preisler* and *Wells* v. *Rockefeller* elucidating the one man, one vote rule have binding application to state apportionment, thereby invalidating Article 4, Section II, paragraphs 1 and 3 of the New Jersey Constitution.

2. Whether assuming that *Kirkpatrick* and *Wells* do not apply to state apportionment and that there are rational policies justifying the deviations, the population deviations authorized by the New Jersey Constitution, Article 4, Section II, paragraphs 1 and 3 exceed the limits permitted by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

3. Whether the population deviations of the New Jersey state apportionment plan are justified by rational state policies as required by the Equal Protection Clause of the Fourteenth Amendment.

4. Whether the multi-member Senate districting plan authorized by the New Jersey Constitution, Article 4, Section II, paragraph 1 is violative of the Constitution of the United States.

Constitutional and Statutory Provisions Involved

This petition involves the application of the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

New Jersey Constitution, Article 4, Section 2, paragraph 1:

> Three (3) Senators; number; senate districts
>
> 1. The Senate shall be composed of forty senators apportioned among Senate districts as nearly as may be according to the number of their inhabitants as reported in the last preceding decennial census of the United States and according to the method of equal proportions. Each Senate district shall be composed, wherever practicable, of one single county, and, if not so practicable, of two or more contiguous whole counties. Adopted general election November 8, 1966.

New Jersey Constitution, Article 4, Section 2, paragraph 3:

> The General Assembly shall be composed of eighty members. Each Senate district of which only one senator is apportioned shall constitute an assembly district. Each of the remaining Senate districts shall be divided into Assembly districts equal in number to the number of senators apportioned to the senate district. The assembly districts shall be composed of contiguous territory, as nearly compact and equal in the number of their inhabitants as possible, and in no event shall each district contain less than eighty percent nor more than one hundred twenty percent of one-fortieth of the total number of inhabitants of the State as reported in

the last preceding decennial census of the United States. Unless necessary to meet the foregoing requirements, no county or municipality shall be divided among assembly districts unless it shall contain more than one-fortieth of the total number of inhabitants of the State, and no county or municipality shall be divided among a number of assembly districts larger than one plus the whole number obtained by dividing the number of inhabitants in the county or municipality by one-fortieth of the total number of inhabitants of the state. Adopted general election November 8, 1966.

Preliminary Statement

In New Jersey a full decade has gone by during which the judicial process has been utilized in a continuingly frustrating effort to stimulate the political processes of the State into apportioning a constitutionally valid legislature. During that time attacks on the State's legislative apportionment plans generated no less than eleven appellate opinions: the Supreme Court has three times viewed specific plans as invalid but withheld its judgment to permit the legislature or State Apportionment Commission time to remedy the defects; three times denied specific legislative attempts to postpone reapportionment; and three times approved dubious plans as interim measures due to impending elections. In the decision prior to the one at bar the Commission, which had twice previously been admonished by the Court, submitted its plans so late as to prevent a thorough adjudication. Nonetheless the New Jersey Supreme Court, which has asserted itself as the leader in local reapportionment efforts, has only this term approved standards of reapportionment which are inconsistent with those enunciated by this Court.

With the impending release of the 1970 Census population figures New Jersey, like all the other states, will again be apportioning its legislature. If the repeated and unsettled litigation of the past ten years is not to go on unending into the 1970's, it is imperative that the Court now erase any doubts that may remain as to the degree to which the State plans are bound by the federal standards heretofore and soon to be enunciated.

Statement of the Case

New Jersey is politically subdivided into twenty-one counties of widely disparate sizes, populations and demographies, each containing varying numbers of municipalities.

In the decision below the New Jersey Supreme Court held that the State apportionment scheme's adherence to existing county and municipal lines in the drawing of legislative districts would justify a departure from a standard of mathematical equality of population. The Court held that the resultant authorized maximum deviation of the plan, 1.5:1, was permissible for the same reason.

The adherence to county lines in the formulation of Senate Districts compels the result that these districts will be of grossly disparate sizes and populations and, accordingly, that most of them will be multi-member represented. Each Senator in a multi-member district runs at-large. A heavily-populated county such as Essex (projected 1970 pop.: 973,400) comprises a single Senate District with 6 Senators, while rural Cape May and Cumberland Counties (projected 1970 pop., combined: 190,300) also comprise a single district, with one Senator. Each of 40 Assembly Districts is within a single Senate District, with between one and three Assembly Districts per

Senate Districts. Population variances occasionally require a few Assemblymen to run at large in bigger areas.

The specifics of reapportionment are carried out by the State Apportionment Commission, an eleven member body which is composed of five representatives of the two major political parties and an additional member appointed by the Chief Justice of the New Jersey Supreme Court to prevent deadlocks.

Based on 1960 Census population figures the Commission has, with the aid of computers, certified Senate and Assembly Districts for recent general elections. The New Jersey Supreme Court in the case below approved the Districts certified for 1968-69 and 1970-71. In addition the Commission has already proposed several plans for new Senate Districts based on projected 1970 population figures. Tables in the Appendix, *infra* at pp. 18a-22a, 27a describe population deviation statistics for the approved 1968-69 and 1970-71 districts and for the four *best* proposed Senate plans.[1]

As evidenced by these tables the average percent deviation from ideal for the most recent approved Assembly Districts is plus or minus 5.6%. The population variances range from 15.71% below to 13.1% above population equality, a deviation ratio of 1.34:1. The deviations of twenty-nine of the 39 districts certified, as well as the average deviation, have greater percent deviations from ideal than the maximum deviation proscribed by this Court (3.13%) in *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969).

The same tables reveal that each of the best proposed Senate District plans utilizes 1970 population projections

[1] Petitioners ask the Court for leave to submit additional figures when the 1970 Census results are published, so as to supplement this record.

results in an average percent deviation from the population ideal of plus or minus 3.4%. In the best plan, the maximum population deviation from the ideal is 8.0%. Half the Districts reflect percent deviations greater than the average. Past apportionment plans have shown greater deviations in the Assembly plans.

POINT I.

The decisions of this Court in *Kirkpatrick* v. *Preisler* and *Wells* v. *Rockefeller* elucidating the one man, one vote rule have binding application to state apportionment, and therefore Article 4, Section II, paragraphs 1 and 3 of the New Jersey Constitution are invalid.

This Court has established an identical constitutional standard for congressional and state legislative apportionment. In *Wesberry* v. *Sanders*, 376 U. S. 1, 7-8 (1964) and *Reynolds* v. *Sims*, 377 U. S. 533, 577 (1964), the Court held that the United States Constitution requires that the population of legislative districts approach mathematical equality "as nearly as is practicable." That standard was elucidated last term in the companion cases of *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969) and *Wells* v. *Rockefeller*, 394 U. S. 542 (1969). Those cases made clear that for the purpose of congressional districting nothing short of mathematical precisions could be tolerated without justification, and that the use of political subdivision lines resulting in population variances is not permissible. There has, however, been no definitive determination as to whether those cases apply with equal force to state legislative apportionment.

In its opinion below, the New Jersey Supreme Court upheld Article 4, Section 2, paragraphs 1 and 3 of the

New Jersey Constitution which establish a formula for state legislative apportionment requiring adherence to county and municipal lines. These provision further authorize a ratio between the population of largest and smallest districts of up to 4.5 to 1. In upholding these provisions the New Jersey Court concluded that *Kirkpatrick* and *Wells* did not apply to state apportionment, particularly insofar as those cases invalidated the use of political subdivision lines. 55 N. J. at 379-380. Thus for the first time the question of the binding effect of the *Kirkpatrick* and *Wells* cases on state apportionment is squarely before this Court.

It is essential for the Court to settle this question at a time when each of the 50 states must reapportion in accordance with the 1970 census figures. Neither the state legislatures nor the courts can presently be certain of the constitutional standard they must apply to insure that no man is deprived of his right to equal representation. See *Opinion of the Justices*, Me., 255 A. 2d 886 (1969). Certainty as to the proper standard is therefore crucial to secure this fundamental right, to avoid multiple litigation and to prevent inconsistent decisions.

Petitioners contend that *Kirkpatrick* and *Wells* do apply to state legislative districting. In support of their contention petitioners first note that this Court chose identical language, "as nearly as practicable," to define the reapportionment standard for both congressional and state districting. See *Wesberry* v. *Sanders*, *supra*, and *Reynolds* v. *Sims*, *supra*. Secondly, petitioners point to the Court's reliance in *Kirkpatrick* on state apportionment cases. *Reynolds* itself is cited extensively. 394 U. S. at 531, 535-536. Justice White emphasized this reliance in his dissent:

> It also seems arbitrary for the majority to discard the suggestion of *Reynolds* v. *Sims*, 377 U. S. 533

> (1964), that if a legislature seeks an apportionment plan which respects the boundaries of political subdivisions, some variations from absolute equality would be constitutionally permissible. Of course *Reynolds* involved state legislative apportionment and took pains to say that there may be more leeway in that context. But the Court invokes *Reynolds* today and in no way distinguishes federal from state districting. 394 U. S. at 554.

The Court in *Kirkpatrick* similarly relied on the case of *Swann* v. *Adams*, 385 U. S. 440 (1967), 394 U. S. at 532.

Finally, petitioners' contention is supported by the reasoning of *Kirkpatrick* and *Wells*. In *Kirkpatrick* the Court held that

> [T]he command of Art. I, 2, that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite good faith effort to achieve equality, or for which justification is shown. 394 U. S. at 531.

Missouri had initially argued that there is a *de minimus* range with which population deviations satisfy the "as nearly as practicable" standard. In rejecting this argument the Court gave several reasons, none of which depended on or related to the fact that congressional districting was then at issue.

Missouri then proffered various justifications for its population deviations. The Court rejected these arguments, again with reasoning equally applicable to state and congressional districting. Thus, Missouri argued that deviations were justified as a necessary result of using political subdivision lines in order to avoid partisan gerry-

mandering, a justification suggested by *Reynolds*, 377 U. S. at 537. The Court found that this argument was "no more than a variant of the argument, already rejected, that considerations of practical politics can justify population disparities." 394 U. S. at 534.

The *Wells* case dealt with a New York districting plan which defined substate regions according to county lines and interest orientations and then constructed districts within these substate regions. The Court struck down this scheme, with reasoning again applicable to both state and congressional districting:

> But we made clear in *Kirkpatrick* that "to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people." 394 U. S. at 546.

If *Kirkpatrick* and *Wells* do apply to state redistricting, it is clear that the New Jersey scheme must fall. In its opinion below, the Supreme Court of New Jersey ruled "that it can not be said that the ratio of 1.5 to 1 authorized by our State Constitution is inherently bad," so long as the plan with the least deviation is selected and the resulting deviation is justified. 55 N. J. at 382. The New Jersey Court thus found that a reapportionment plan drawn in accordance with the state constitutional requirement of adherence to municipal and county lines is a plan drawn in good faith so long as it is the best plan of those drawn. The Court further held that deviations of the magnitude inevitably resulting from that state constitutional mandate are justified.

Plans already submitted by the New Jersey Reapportionment Commission for 1970 based on population projec-

tions uniformly present *average* population deviations from the ideal which exceed the *maximum* deviation of Missouri's plan in *Kirkpatrick* (See Appendix, *infra* at p. 20a, 21a, 27a.) Such deviations are not "limited" as required by *Kirkpatrick* and *Wells*. The plan previously upheld by the New Jersey Supreme Court in *Jackman* v. *Bodine*, 53 N. J. 585 (1969) *cert.* denied 396 U. S. 822 (1969), also contained deviations well in excess of those prescribed in *Kirkpatrick* and *Wells*. Moreover, New Jersey, like New York in the *Wells* case, cannot seriously contend that such deviations are unavoidable if by the simple expedient of breaking down county and municipal lines, the State "could . . . come much closer to providing districts of equal population." *Swann* v. *Adams*, 385 U. S. at 445 (1967). In fact county and municipal lines are not sacrosanct under the New Jersey Constitution as all the reapportionment plans submitted to date to break down certain county and municipal lines while maintaining others.

New Jersey cannot contend in the light of *Kirkpatrick* and *Wells* that there is any legally acceptable justification for the population variances inevitably resulting from the requirement that political subdivision lines be followed. As already noted in *Kirkpatrick*, the Court unequivocally rejected the argument that use of existing county, municipal or other political subdivision boundaries to avoid partisan gerrymandering constitutes a legally acceptable justification for population deviations. Likewise in *Wells*, the Court explicitly rejected New York's attempts to justify its scheme as a means of keeping regions with distinct interests intact and maintaining county integrity. This Court, then, has already rejected the considerations offered by the New Jersey Court to justify New Jersey's population deviations.

In its opinion below the Supreme Court of New Jersey recognized the use of political subdivision lines is now

ruled out in congressional districting. However, the New Jersey Court found a viable distinction between the federal and state apportionment situations and therefore held that "*Kirkpatrick* and *Wells* did not undermine the holding of *Reynolds* that the use of existing political subdivisions may justify a deviation from mathematical equality in state legislative districting." 55 N. J. at 379-380. As to gerrymandering, the New Jersey Court reasoned that because "the opportunitities for gerrymandering are far more numerous with respect to elections to the state legislature," reliance on political subdivision lines "does limit that opportunity and does tend to make the political party responsible for the district plan more readily accountable at the polls." 55 N. J. at 379. Such reasoning ignores the fact that *Kirkpatrick* clearly stated that the State's interest in minimizing opportunities for gerrymandering is not an interest which justified population deviations, whether or not those opportunities are numerous. Such reasoning further ignores the Court's suggestion in *Kirkpatrick* that adherence to subdivision boundaries is in fact an ineffective way of inhibiting gerrymandering. See 394 U. S. at 534, footnote 4.*

As to the relationship between political entities and the legislative process, the New Jersey Supreme Court found that "the county and municipality are the meaningful units in state-local relations in many more situations [than federal-local], and elections from districts are the more worthwhile if the county and the municipality are reflected in drawing the district lines." 55 N. J. at 379. The recognition of such units would appear "to accept population

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* The opinion below also appears to conflict with the New Jersey Court's earlier statement that "*Kirkpatrick* and *Wells* cast some possible doubt upon the utility of that approach with respect to . . . gerrymandering." 53 N. J. 585, at 588.

variances . . . in order to create districts with specific interest orientations," held in both *Kirkpatrick* and *Wells* to be "antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people." Thus in *Wells* the Court held:

> Nor are the variations in the 'North country' districts justified by the fact that these districts are constructed of entire counties. 394 U. S. at 546.

Nevertheless the Supreme Court of New Jersey has explicitly held that the principles enunciated in *Kirkpatrick* and *Wells* are not controlling in a consideration of a state apportionment plan. Courts have differed as to the binding effect of *Kirkpatrick* and *Wells* in the state legislative context. The case of *Abate v. Mundt*, 25 N. Y. 2d 309, 253 N. E. 2d 189 (Ct. App. 1969), *cert.* granted, ___ U. S. ___, 25 L. Ed. 2d 90 (Sup. Ct. 929 (Feb. 24, 1970), cited in the opinion below, upheld a county apportionment plan resulting in deviations of 12% against constitutional attack. The New York Court of Appeals stated that:

> Decisions dealing with apportionment of State Legislatures tend to reflect a broader scope for permissible deviations and a more tolerant attitude toward the practical justification for deviations.' 253 N. E. 2d at 192.

Other cases, however, have strictly applied *Kirkpatrick* and *Wells* to state apportionment plans. See, for example, *Klahr v. Williams*, 303 F. Supp. 224 (D. Ariz. 1969) in which a three-judge federal court invalidated an Arizona apportionment plan, relying on the holding of *Kirkpatrick* and *Wells* that there is no permissible *de minimus* variation.

Thus a question demanding resolution has been placed squarely before this Court. Its resolution at this time is

of critical importance, not merely to New Jersey, but to all 50 states. Further, its resolution in the context of state legislative apportionment is at least as crucial as its resolution in the context of intrastate apportionment. Cf., *Abate* v. *Mundt*, *supra*. For these reasons, petitioners urge the Court to grant certiorari.

POINT II

Assuming that *Kirkpatrick* and *Wells* do not apply to state apportionment and that there are rational state policies justifying the deviations, the population deviations authorized by the New Jersey Constitution, Article 4, Section II, paragraphs 1 and 3 exceed the limits permitted by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Petitioners contend that even if the population deviations of the magnitude inevitably resulting from the plan approved by the New Jersey Supreme Court can be justified by a rational state policy, they are not constitutionally permissible. This Court held explicitly in *Reynolds* that apportionment must be based substantially on population and the equal population principle must not be diluted in any significant way and further that in apportioning, "the overriding objective must be substantial equality of population." 377 U. S. at 579. The Court went on to underscore the primacy of the population factor, stating that population cannot be submerged as the controlling consideration "even as a result of a clearly rational state policy of according some legislative representation to political subdivisions." 377 U. S. at 581.

The Court has never ruled directly on the extent to which population variances can be justified. However, the

Court has in dictum shed some light on the point at which the equal population principle is diluted. In *Kilgarlin v. Hill*, 386 U. S. 120 (1967), the Court struck down a Texas apportionment plan involving a maximum variance of 14.8% and a ratio of largest to smallest districts of 1.31 to 1, finding that Texas had failed to select the best plan of those embodying the State's announced policy. The Court there stated:

> We are doubtful, however, that the deviations evident here are the kind of "minor" variations which *Reynolds v. Sims* indicated might be justified by local policies counseling the maintenance of established political subdivisions in apportionment plans. 386 U.S. at 123.

By approving the state constitutional scheme, the New Jersey Supreme Court has authorized a population variance between the largest and smallest district of 1.5 to 1. The state reapportionment plan utilizing 1960 population figures recently approved by the New Jersey Supreme Court contained a maximum deviation of 15.7% and the population variance between the largest and smallest districts was 1.34 to 1. *Jackman v. Bodine*, 53 N. J. 585 (1969), *cert.* denied 396 U. S. 822 (1969). Such deviations well exceed the deviations said to be of doubtful constitutionality in *Kilgarlin* and their magnitude strongly suggests that adherence to political subdivision lines is as much of a controlling consideration as the striving for population equality.

Moreover, since the means of apportioning the State Assembly is keyed to the means of apportioning the State Senate, any population variance in the one will also be reflected in the other. Thus a person underrepresented in the Assembly will also be underrepresented in the Senate, and a person overrepresented in the Senate will also

be overrepresented in the Assembly. This Court has recognized that the cumulative effect of such deviations may invalidate a districting plan.

> [D]isparities from population-based representation, though minor, may be cumulative instead of offsetting where the same areas are disadvantaged in both houses of a state legislature, and may therefore render the apportionment scheme at least constitutionally suspect. *Lucas* v. *Forty-Fourth General Assembly of Colo.*, 377 U. S. 713, 735, footnote 27.

Nevertheless the New Jersey Supreme Court relying on the fact that this Court has never ruled directly on the issue of maximum permissible deviations has concluded that a variance of 1.5 to 1 in both the Assembly and the Senate is not "inherently bad." This Court should grant certiorari to determine whether that conclusion is consistent with *Reynolds*, *Kilgarlin* and *Lucas*.

POINT III

The population deviations of the New Jersey state apportionment plan cannot be justified by rational state policies as required by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Petitioners further contend that there is no rational state policy which can justify the deviations inevitably resulting from the use of county and municipal lines in New Jersey legislative apportionment. The burden to come forward with an acceptable justification lies with the state. *Swann* v. *Adams*, *supra*, at 443-444, and any proffered justification must be carefully scrutinized.

> [S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. *Reynolds* v. *Sims*, *supra*, at 562.

Accord: *Harman* v. *Forssenius*, 380 U. S. 528, 537 (1965). *Wesberry* v. *Sanders*, *supra*, at 17, *Soc. Labor Party* v. *Rhodes*, 290 F. Supp. 983. (1968), aff'd 393 U. S. 23 (1968).

Courts have a special responsibility in determining the validity of the state policy offered to justify deviations from equality in voting.

> [T]he deference usually given to judgment of the legislators does not extend to decisions concerning which resident citizens may participate in the election . . . when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a "rational basis" for the distinctions made are not applicable. *Kramer* v. *Union Free School Dist.*, 395 U. S. 621, 627 (1969).

In its opinion below, the New Jersey Supreme Court put forward two policies suggested by Reynolds as viable justifications for population variances: the deterrence of partisan gerrymandering and the giving of a voice to local governmental units charged with various responsibilities incident to the operation of state government. *Reynolds*, *supra*, at 578-581. These two policies were said to have survived *Kirkpatrick* and *Wells*, and their achievement was said to be furthered by the use of political subdivision lines. *Jackman* v. *Bodine*, 55 N. J. at 379. Petitioners challenge these conclusions of the New Jersey Court.

Petitioners question the rationality of the use of subdivision lines as an effective means of deterring gerrymandering first for the reasons given in *Kirkpatrick*:

> It is dubious in any event that the temptation to gerrymander would be much inhibited [by adhering to subdivision lines], since the legislature would still be free to choose which of several subdivisions, all with their own political complexion, to include in a particular congressional district. Besides, opportunities for gerrymandering are greatest when there is freedom to construct unequally populated districts. "[T]he artistry of the political cartographer is put to its highest test when he must work with constituencies of equal population. At such times, his skills can be compared to those of a surgeon, for both work under fixed and arduous rules. However, if the mapmaker is free to allocate varying populations to different districts, then the butcher's cleaver replaces the scalpel; and the results reflect sharply the difference in the method of operation." A. Hacker, Congressional Districting, 59 (1964 rev. ed.), 394 U. S. 526 at footnote 4.

The Supreme Court of New Jersey concedes that "the use of existing county and municipal lines does not foreclose partisan selection of district lines," but claims that "it does limit that opportunity and does tend to make the political party responsible for the district plan more readily accountable at the polls." 55 N. J. at 379. The New Jersey Court states at 379 that thousands of computer made plans, all mathematically perfect, are possible if subdivision lines are disregarded. However, the New Jersey Court took no expert testimony on this issue and the only pertinent evidence in the record is the Affidavit of James Weaver submitted by petitioners with their brief in the previous *Jackman* v. *Bodine* case, 53

N. J. 585 (1969) *cert.* denied 396 U. S. 822 (1969). That affidavit indicates that the number of alternative plans is in fact very limited. See appendix, *infra* at (28a-33a).

Nor is accountability at the polls a valid state interest justifying population deviations in view of the fact that in New Jersey an independent reapportionment commission is responsible for drafting the districting plans. By constitutional mandate this commission is composed of an even number of Republicans and Democrats and one neutral member. New Jersey Constitution, Article 4, Section 3, paragraphs 1 and 2.

As to the relation between state and local governmental functions, the New Jersey Supreme Court simply stated that "elections from districts are the more worthwhile if the county and the municipality are reflected in drawing the district lines." 55 N. J. at 379. The New Jersey Court merely relied on the suggestion of Reynolds that it may be appropriate to give a voice to local governmental entities, 377 U. S. at 580-581, without in any way explaining or detailing why this is a rational or worthwhile policy for New Jersey apportionment.

The Court in *Reynolds* was not faced with a plan which a particular state was attempting to justify in this manner. Rather, the Court was speculating on considerations which might be put forth to justify limited population deviations. Since the decision in *Reynolds*, there has been some indication that the Court does not regard the desire to give a voice to local governmental entities as a legally acceptable consideration. In his dissenting opinion in *Hadley et al.* v. *The Junior College District of Metropolitan Kansas City Missouri et al.*, —— U. S. ——, 25 L. Ed. 2d 45, 90 S. Ct. 763 (1970), Justice Harlan objected to the application of the one-man one-vote rule to school district apportionment, stating:

> "Why is the Court willing to accept inequality that derives from a desire to give representation to component school districts, when similar inequality in state legislative districting could probably not be justified by a desire to give representation to counties. Cf. *Reynolds* v. *Sims*, 377 U. S. at 579-581; *Swann* v. *Adams*, 385 U. S. at 444." 25 L. Ed. 2d 58.

See also *Wells* v. *Rockefeller*, *supra*, at 546.

Petitioners submit that in New Jersey the maintenance of local governmental entities is not crucial to legislative districting.

The most recently approved plan underscores this fact, since many districts break down county and municipal lines. Various districts under the recent plant include either counties, parts of two counties, parts of a city, parts of a city and other towns, several towns, or cities and towns within one county. Most legislators therefore already represent and must be familiar with the governments and problems of numerous localities. It is difficult to see how the breakdown of county and municipal lines would appreciably decrease the efficiency of the legislature.

In any event, in the absence of reasons offered either by the state or by the Court showing the importance of maintaining county and municipal lines, this state requirement cannot be considered a valid justification for population deviations.

Petitioners reside in the City of Newark. This City has, in all of the reapportionment plans drawn to date, and in the one authorized by the decision below, had its municipal boundaries broken for the purpose of achieving equality of representation in the legislature. If, as the

court below has indicated, there is a rational basis for adhering to municipal lines because of the governmental and political functions related to such entities, then whatever advantage flows from maintaining municipal lines in in a reapportionment plan has been denied to petitioners and other residents of the City of Newark. The Court below, has thus considered it rational to achieve equality of representation by breaking down the municipal lines of the City of Newark but, has not considered it ratonal to break down other municipal and county lines to achieve proper apportionment. Thus some voters will receive the double benefit of having their political subdivision represented and being overrepresented in the legislature. Others, like petitioners, may be subjected to the double disadvantage of not having their local entity represented and being underrepresented in the legislature.

POINT IV

The multi-member Senate districting plan authorized by the New Jersey Constitution Article 4, Section II, paragraph 1 is violative of the Constitution of the United States.

When this Court first ruled on the validity of multi-member districting in *Fortson* v. *Dorsey*, 379 U. S. 433 (1965), it tentatively concluded that a multi-member districting scheme in which members run at-large in some districts was not *per se* violative of the Equal Protection Clause. The majority characterized the complaining party's assertions as "highly hypothetical" (379 U. S. at 437), and even Justice Douglas agreed in his dissenting opinion that the Court had been given "no idea" of how the scheme was prejudicial. Nonetheless the opinion was careful to make clear that the Court had not ruled that multi-member dis-

tricting plans satisfy Equal Protection "in all instances or under all circumstances . . ." 379 U. S. at 439. The opinion continued:

> It might well be that, designedly *or otherwise*, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to *minimize* or cancel out the voting strength of racial or political elements of the voting population. 379 U. S. at 439 (Emphasis added)*

This Court admonished that it would have to be specifically shown why a multi-member districting plan is invalid. This colors the decisions of the few lower Federal Court decisions after *Fortson* which rejected attacks on multi-member districting schemes. Those cases can be viewed as turning on the fact that the complainants had either shown no "authority" for breaking up such districts (e.g., *Schaeffer* v. *Thomson*, 251 F. Supp. 450 (D. Wyo. 1965), aff'd *sub nom Harrison* v. *Schaeffer*, 383 U. S. 269 (1966)) or no "discrimination". (e.g., *Mann* v. *Davis*, 245 F. Supp. 241, 245 (E.D. Va.), *aff'd sub nom Burnette* v. *Davis*, 382 U. S. 42 (1965). In its next case concerning multi-member districting, this Court again stressed the necessity of demonstrating discrimination. The opinion asserted "[w]here the requirements of *Reynolds* v. *Sims* are met, apportionment schemes including multi-member districts will constitute an invidious discrimination only if it can be shown that designedly or otherwise . . . [reciting the above-quoted language from *Fortson*]." *Burns* v. *Richardson*, 384 U. S. 73, 88 (1966). There, as in *Fort-*

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* *Wright* v. *Rockefeller*, 376 U. S. 52 (1964) was a case where it was alleged that the legislature had gerrymandered Congressional Districts on racial lines. The Court found a failure of proof. Any intimation in that case that *intent* to discriminate must be shown is clearly laid to rest by *Fortson*.

son, it was conceded that population deviations among the districts were well within the then existing constitutional limits approved by this Court.

Since the *Burns* decision, the constitutional validity of multi-member districting has continued to be debated in the lower Federal Courts, in legal journals and in local reapportionment studies. Indeed, this Court noted that its decisions had not foreclosed "attempts to show that in the particular circumstances of a given case multi-member districts are invidiously discriminatory." *Kilgarin v. Hill*, 386 U. S. 120, 125 footnote 3 (1967). The New Jersey Supreme Court this term in the opinion below concluded that the validity of such districts remains "far from settled," and announced that it would "await further developments" rather than pass on the issue at this time. *Jackman v. Bodine*, 55 N. J. 371, 384.

The leading article analyzing multi-member districting appeared soon after *Burns v. Richardson* was reported. Professor John Banzhaf in his article, *Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle*, 75 *Yale L.J.* 1309 (1966) laid to rest the numerous mathematical and judicial rationalizations for multi-member districts. Working within the concepts of *Reynolds v. Sims*, *supra*, Professor Banzhaf concluded that ". . . no mixed system of single and multi-member districts—or system using multi-member districts of different sizes—can provide substantially equal representation or voting power for all citizens." The effect of the thesis was immediate and widespread. It has recently been noted that a "significant preference for single-member districting" can be seen in much of the country and that this preference ". . . demonstrates a realization of certain deficiencies and inequities inherent in the multi-member system notwithstanding the arguments traditionally made

in its behalf." Dixon & Hatheway, *The Seminal Issue in State Constitutional Revision: Reapportionment Methods and Standards*, 10 *Wm. & Mary L. Rev.* 888, 903 (1969).

This term the Court has already accepted for argument two cases which raise significant questions as to the constitutional validity of multi-member districting: *Charis v. Whitcomb*, 305 F. Supp. 1364 (S.D. Ind. 1969), *prob. jurisd. noted*, 38 U.S.L.W. 3369 (3-24-70); and *Abate v. Mundt*, 25 N. Y. 2d 309, 305 N. Y. S. 2d 465, 253 N. E. 2d 189 (1969); cert. granted, 25 L. Ed. 2d 26, 90 S. Ct. 929 (2-24-70). On the basis of a detailed factual presentation, the lower Court concluded that plaintiffs had *proven* that the particular multi-member districting scheme operated "to minimize and cancel out the voting strength of a cognizable racial minority group", 305 F. Supp. at 1399, as required by *Fortson*. As will be argued in more detail *infra*; the instant case presents a factual situation which, together with *Charis*, will permit this Court to delineate the parameters of proof required to establish unconstitutional minimization or cancellation of a minority group's voting strength. For that reason petitioners urge this Court to grant certiorari.

The instant case is even more complementary to *Abate*, which specifically asks this Court to address itself to the Banzhaf doctrine of inherent unconstitutionality of multi-member districting. Since this case involves a state-wide plan while *Abate* involves an intrastate political unit, and since this case presents population deviations noticeably different, a consideration of both cases together will serve to settle more questions and limit future litigation. As indicated *supra*, the particular moment in time demands a clear resolution of as many basic reapportionment questions as possible.

Petitioners submit that it is not necessary to go to the extent that the Court did in *Charis* to establish that a

relatively cohesive entity such as an urban "black vote" is cognizable as a voting group and that its voting strength is minimized or cancelled. The initial proposition scarcely compels proof in this day and age and the latter can also be demonstrated with little difficulty. New Jersey's populous urban counties, all of which are multi-member Senate Districts, are the counties wherein the vast majority of black citizens in the State live. This Court should take judicial notice of the fact that the vast majority of black citizens residing in the industrial northeast, reside in the cities which in this case, includes Newark, New Jersey.

A majority of the black population of Essex County reside within the City of Newark while much of the remainder of the County is predominantly white and suburban. The black population of the City of Newark is at least approximately 50% black, whereas the black population of the county is 25%. It is clear that black voting strength is at least minimized, if not eliminated by at-large elections.

The "Report for Action" of the Governor's Select Commission on Civil Disorders, State of New Jersey, February, 1968, underscored the fact that there is but minimal involvement of the urban black community in the "mainstream" of local political life, and recommended, at p. 162:

> To help relieve the feeling of Negro powerlessness, both political parties should support the emergence of more Negro candidates and should encourage active participation of Negroes of all economic levels in this political process.

All the elected officers of the county, as well as all state legislators, under the pre-1966 apportionment acts had run at-large in the county, thus enabling this minority group to be excluded, as noted above. Indeed, in each at

large senate election held to date under the plan here attacked, the entire party state was elected each time.

Petitioners submit that this case may be resolved both under the Fourteenth Amendment as suggested by *Fortson* v. *Dorsey*, *supra* and under the Fifteenth Amendment, regarding dilution of the black franchise. This Court has traditionally resolved voting rights cases similarly under both amendments [Compare *Nixon* v. *Condon*, 286 U. S. 73 (1932) (Fourteenth Amendment) with *Terry* v. *Adams*, 345 U. S. 461 (1953) (Fifteenth Amendment)], and more recently, has utilized each to void schemes which tended to minimize minority voting. See, *e.g.*, *Harper* v. *Virginia State Board of Elections*, 383 U. S. 663 (1966) (burdensome procedure discriminated against poor people in violation of the Fourteenth Amendment); and *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960) (wholesale exclusion of black vote from a municipality violated the Fifteenth Amendment and see *Gaston County* v. *United States*, 395 U. S. 285, 293 (1969).

Even before *Fortson* v. *Dorsey*, *supra*, it has been clear in other areas that actions by the state which have racially disadvantageous effects are constitutionally suspect even where actual intent cannot be demonstrated. See, *e.g.*, *Johnson* v. *Virginia*, 373 U. S. 61, 62 (1963); *Eubanks* v. *Louisiana*, 356 U. S. 584, 587-88 (1958). This Court's opinion in *Gomillion*, though satisfied that intent was demonstrable, commented that the "inevitable effect" of a statute could compel the same decision, 364 U. S. at 341-42. See also *Hill* v. *Texas*, 316 U. S. 400, 404; *Glasser* v. *United States*, 315 U. S. 60, 86 (1942); *Griffin* v. *Illinois*, 351 U. S. 12 (1956); *Smith* v. *Texas*, 311 U. S. 128, 132 (1940); and *Hernandez* v. *Texas*, 347 U. S. 475, 482 (1954). The parameters of proof of the "effect" in these cases was not complex. Petitioners submit that the instant case is controlled by these principles and asks this Court to resolve these questions at this crucial time.

CONCLUSION

Petitioners have asserted substantial federal claims raising important constitutional rights. For the reasons submitted, petitioners respectfully pray that a petition for writ of certiorari be granted.

Respectfully submitted,

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May 28, 1970

[APPENDICES FOLLOW]

APPENDIX A

Opinion of the Supreme Court of New Jersey

CHRISTOPHER JACKMAN, *et al.*, PLAINTIFFS-APPELLANTS v. JOHN M. BODINE, *et al.*, DEFENDANTS-RESPONDENTS.

THE ELIZABETH DAILY JOURNAL, *et al.*, PLAINTIFFS-APPELLANTS v. ROBERT J. BURKHARDT, *et al.*, DEFENDANTS-RESPONDENTS.

Argued September 23, 1969—Decided March 2, 1970.

The opinion of the court was delivered by

WEINTRAUB, C. J. This is another in a series of opinions relating to apportionment of the State Legislature. *Jackman* v. *Bodine*, 43 N. J. 453 (1964); 43 N. J. 491 (1964); 49 N. J. 406 (1967); 50 N. J. 127 (1967); 54 N. J. 585 (1969), cert. den. 396 U. S. 822, 90 S. Ct. 63, 24 L. Ed. 2d 73 (1969).

In the last *Jackman* opinion we expressed doubts as to whether the basic plan of apportionment in our State Constitution is compatible with federal constitutional requirements and directed further argument "to the end that the matter may be settled, if possible, well in advance of" the next election which will be held in 1971. 53 N. J., at 588-589. We have since had that further argument.

We should point out that the 1967 and 1969 *Jackman* opinions just cited involved the validity of apportionments made under the "Schedule" of the State Constitution which, for the purpose of electing Senators and Assemblymen in 1967 and "until the 1970 decennial census of the United States shall have been received by the Gov-

ernor," created 15 Senate districts consisting of one or more counties and directed the creation of Assembly districts on the basis of those Senate districts. Art. XI, §V, pars. 1-4. We are here concerned with the permanent plan in the State Constitution for subsequent elections. Art. IV, §II, pars. 1-3. Of course no apportionment has been made under the permanent plan for the 1971 election and hence we can consider only the face of the plan and what its terms might permit.

I

Reynolds v. *Sims*, 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), found that the equal protection clause of the Fourteenth Amendment embodied the principle that every man's vote shall equal every other man's vote. In the words of *Reynolds*, 377 U. S., at 565-566, 84 S. Ct., at 1383, 12 L. Ed. 2d at 529-530:

> And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live. Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment. Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the

election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 573, 38 A. L. R. 2d 1180, or economic status, Griffin v. People of State of Illinois, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891, 55 A. L. R. 2d 1055, Douglas v. People of State of California, 372 U. S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811.

And *Reynolds* v. *Sims* concluded that this demand for equality required that both houses of a bicameral legislature be apportioned upon the basis of one vote per man, notwithstanding that the Federal Constitution itself apportions the Senate upon the basis of equal representation for each State without regard to population. In rejecting this "federal analogy," the Court explained that the federal plan was "conceived out of compromise and concession indispensable to the establishment of our federal republic." 377 U. S., at 574, 84 S. Ct. at 1388, 12 L. Ed. 2d at 534.[1] This is not to say that a majority of the people, being also of the minority in many things, cannot rationally agree their total security is better served if the will of a house apportioned solely upon population is subject to the "veto" of a second house apportioned upon another basis. Indeed, *Reynolds* v. *Sims* did not denounce such a political plan as "irrational." Rather the Court

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[1] In point of fact, in 1787 the federal plan was an established form of democratic government, existing in New Jersey and continuing here until *Reynolds* v. *Sims* was decided. *Jackman* v. *Bodine*, *supra*, 43 N. J. at 463-467.

held the equal protection clause struck it down, 377 U. S. at 575, 84 S. Ct. at 1389, 12 L. Ed. 2d at 535:

> This does not necessarily mean that such a plan is irrational or involves something other than a 'republican form of government.' We conclude simply that such a plan is impermissible for the States under the Equal Protection Clause, since perforce resulting, in virtually every case, in submergence of the equal-population principle in at least one house of a state legislature.

In short, the Fourteenth Amendment was found to have silently superseded the provision of Art. IV, §4, of the United States Constitution that "The United States shall guarantee to every State in this Union a Republican Form of Government."

In thus rejecting the "federal analogy," *Reynolds* v. *Sims* held the equal protection clause affirmatively assured the majority that its will may not be "frustrated," saying, 377 U. S., at 576, 84 S. Ct. at 1389, 12 L. Ed. 2d at 535-536:

> If such a scheme were permissible, an individual citizen's ability to exercise an effective voice in the only instrument of state government directly representative of the people might be almost as effectively thwarted as if neither house were apportioned on a population basis. Deadlock between the two bodies might result in compromise and concession on some issues. But in all too many cases the more probable result would be frustration of the majority will through minority veto in the house not apportioned on a population basis, stemming directly from the failure to accord adequate overall

legislative representation to all of the State's citizens on a nondiscriminatory basis.

Thus, oddly in a way, the Fourteenth Amendment, which was intended to restrain the will of the majority, was found to insulate the majority will from the restraint of a State Constitution. We need not speculate upon the conceivable reach of the proposition. We refer to it only to highlight the emphasis in *Reynolds* v. *Sims* upon the broad right of a majority, on a one-man one-vote basis, to have its way.

But it would seem that this concept of majority will could be realized only if all candidates ran at large within the political area directly involved, here, the State. This is so because the election of state legislators by districts necessarily means that the value of a man's vote depends upon the voting complexion of the district in which he lives rather than the voting complexion of the whole electorate. As Mr. Justice Stewart pointed out in *WMCA, Inc.* v *Lomenzo*, 377 U. S. 633, 750, 84 S. Ct. 1418, 12 L. Ed. 2d 568, 585 (1964), n. 12, districting conceivably permits a majority in the legislature to be elected by 50%+ of the voters in districts which have 50%+ of the population, so that a little over 25% of the total voters may obtain control. Thus a man's vote may indeed be negated "because of place of residence."

Nonetheless, in an election at large the prevailing party may take all. Besides, if many are to be chosen, the voter may not know all the candidates. Further there are diverse interests which are better represented by candidates elected locally. Doubtless for such reasons, *Reynolds* v. *Sims* recognized the constitutionality of districting despite its inherent contradiction of the principle that no man's

vote may be weighted or diluted by reason of the place where he lives.

It is against this backdrop that the subject of mathematical precision in districting should be considered. We should start with the premise that the very decision to accept districting necessarily departed from the ideal of one-man one-vote, and did so to the substantial extent just mentioned. The question, then, is whether it is not tolerable to accept some further, and perhaps countervailing, imbalance in the drawing of district lines if to do so will tend to advance the purpose of districting.

II

Reynolds v. *Sims* said there may be departures from mathematical equality in drawing district lines in order to maintain the integrity of political subdivisions because (1) adherence to such political lines may deter gerrymandering[2] and (2) local governmental entities are frequently charged with various responsibilities incident to the operation of state government, and hence it is appropriate to provide a voice for that political community.[3] After we held in *Jackman*, *supra*, 43 N. J. 453, that the Senate was

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[2] "* * * Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisian gerrymandering." 377 U. S. at 578-579, 84 S. Ct., at 1390, 12 L. Ed. 2d at 537.

[3] "* * * Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions." 377 U. S. at 580-581, 84 S. Ct. at 1391, 12 L. Ed. 2d at 538.

malapportioned under *Reynolds* v. *Sims*, the State Constitution was amended. The plan thereby adopted calls for adherence to county and municipal lines in the formation of districts. Art. IV, §II, pars. 1-3.[4]

In *Jackman*, *supra*, 53 N. J. 585, we concluded that *Reynolds* v. *Sims* was not undercut in this respect by *Kirkpatrick* v. *Preisler*, 394 U. S. 526, 89 S. Ct. 1225, 22 L. Ed. 2d 519 (1969), and *Wells* v. *Rockefeller*, 394 U. S. 542, 89 S. Ct. 1234, 22 L. Ed. 2d 535 (1969). Those cases did raise doubt as to whether adhering to existing political subdivision lines could justify a population deviation, but they dealt with congressional districting, wher as *Reynolds* v. *Sims* dealt with apportionment of a state legislature. There are differences, as well as similarities, between districting for federal and districting for state purposes.

As to gerrymandering,[5] the problem, it is true, is present both in congressional districting and in state legislative districting, but the opportunities are far more numerous with respect to elections to the state legislature. Nor will the computer likely be of aid if political subdivision lines are ignored. Computer-made plans, all mathematically perfect and doubtless numbering in the thousands,

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[4] As already mentioned, the provisions for the election of legislators "in 1967 and until the 1970 decennial census of the United States for New Jersey shall have been received by the Governor" appear in Art. XI, §V, pars. 1-4. The plan there provided rests upon county lines.

[5] We of course are not speaking of the former practice, so named, which sought partisan advantage by creating districts of unequal population. Rather we speak now of the creation of districts of even absolute numerical equality, but designed for such partisan gain.

will still be keyed to instructions the computer itself can not supply. Of course the use of existing county and municipal lines does not foreclose partisan selection of district lines, but it does limit that opportunity and does tend to make the political party responsible for the district plan more readily accountable at the polls.

And with respect to the relationship between political entities and the legislative process, we recognize that today the county and the municipality are no longer strangers to federal legislation. Nonetheless the county and the municipality are the meaningful units in state-local relations in many more situations, and elections from districts are the more worthwhile if the county and the municipality are reflected in drawing the district lines.

For these reasons, we concluded in *Jackman* v. *Bodine*, *supra*, 53 N. J., at 587-588, that *Kirkpatrick* and *Wells* did not undermine the holding of *Reynolds* that the use of existing political subdivisions may justify a deviation from mathematical equality in state legislative districting. *Cf. Abate* v. *Mundt*, 25 N. Y. 2d 309, 305 N. Y. S. 2d 465, 253 N. E. 2d 189 (Ct. App. 1969), cert. granted 396 U. S. ——, 90 S. Ct. 929, 24 L. Ed. 2d —— (Feb. 24, 1970).

III

The General Assembly is built upon the Senate plan, with two assemblymen being allotted to the Senate district for each senator allotted to that district. The constituency for the election of one senator and two assemblymen is the same, except that if a multi-member Senate district consists of a single county, all senators run at large within that district while the assemblymen run within Assembly districts carved out of that Senate district, two assemblymen to be elected in each such Assembly district.

Appendix A

As to the Assembly districts, a limitation is stated upon permissible deviations from mathematical equality. Art. IV, § II, par. 3, reads in part: . . .

The question now before us is whether the deviations from mathematical equality authorized by our State Constitution exceed the permissible tolerance.

Art. IV, § II, pars. 1-3 may be summarized as follows for the purposes of this and the other questions discussed hereinafter.

Forty senators are to be elected from Senate district. As we have said, the county is central to the formation of those districts. The Senate district shall be composed, wherever practicable, of one county, and if not so practicably, of two or more contiguous whole counties. The Senate district may be single-member or multi-member. All senators are elected by the entire electorate of the Senate district, with this exception: that if two senators are to be elected from a district consisting of two or more counties, then one senator shall be elected in each Assembly district, drawn as will momentarily appear.

> * * * The Assembly districts shall be composed of contiguous territory, as nearly compact and equal in the number of their inhabitants as possible, and in no event shall each such district contain less than eighty per cent nor more than one hundred twenty per cent of one-fortieth of the total number of inhabitants of the state as reported in the last preceding decennial census of the United States. Unless necessary to meet the foregoing requirements, no county or municipality shall be divided among Assembly districts unless it shall

> contain more than one-fortieth of the total number of inhabitants of the state, and no county or municipality shall be divided among a number of Assembly districts larger than one plus the whole number obtained by dividing the number of inhabitants in the county or municipality by one-fortieth of the total number of inhabitants of the state.

Thus the outer limits of deviation within Assembly districts, stated in terms of the ratio between the most and the least populous districts, is 1.5 to 1. Since Assembly districts are carved out of Senate districts, it follows that the deviations per Senator as among Senate districts will not exceed that ratio.

[1, 2] These constitutional provisions obviously embrace a plan, and one which cannot be called capricious. Nonetheless, as is clear from *Reynolds* v. *Sims*, it is not enough that a plan is rational. Equal protection of the law also requires mathematical equality subject only to unavoidable deviations for acceptable reasons and then only if the deviations are within tolerable limits. The question is whether we can say that the ratio of 1.5 to 1 is inherently intolerable.

A canvass of the decisions reveals that only two need be discussed: *Swann* v. *Adams*, 385 U. S. 440, 87 S. Ct. 569, 17 L. Ed. 2d 501 (1967), and *Kilgarlin* v. *Hill*, 386 U. S. 120, 87 S. Ct. 820, 17 L. Ed. 2d 771 (1967).

In *Swann*, the ratio in the Senate was 1.30 to 1, and in the other house was 1.41 to 1. The judgment sustaining the apportionment was reversed, but not because the ratios were inherently intolerable. It was reversed "for the failure of the State to present or the District Court to articulate acceptable reasons for the variations among

the populations of the various legislative districts with respect to both the senate and house of representatives." 385 U. S., at 443-444, 87 S. Ct. at 572, 17 L. Ed. 2d at 504. Proponents of the plan claimed support in prior decisions, including *Lucas* v. *Forty-Fourth General Assembly of Colorado*, 377 U. S. 713, 84 S. Ct. 1459, 12 L. Ed. 2d 632 (1964), and *Harrison* v. *Schaefer*, 383 U. S. 269, 86 S. Ct. 929, 15 L. Ed. 2d 750 (1966). In *Lucas*, the Court had said that a house was "arguably" apportioned on a population basis where the ratio was 1.7 to 1 (377 U. S., at 730 and at 739, n. 32, 84 S. Ct. 1459, 12 L. Ed. 2d at 643 and at 649, n. 32), and in *Harrison* the Court affirmed without opinion *Schaefer* v. *Thomson*, 251 F. Supp. 450 (D. Wyo. 1965), which had upheld an apportionment with a ratio of 2.08 to 1. *Swann* noted that in neither case was "the ratio issue" raised or ruled upon, 385 U. S., at 444-445, 87 S. Ct. 569, 17 L. Ed. 2d at 505, but *Swann* did not say that either ratio was incontestably bad.

In *Kilgarlin*, the ratio involved was 1.31 to 1. The Court was "doubtful" that the deviations could be justified but again declined to decide whether that was so, saying "we need not reach that constitutional question, for we are not convinced that the announced policy of the State of Texas necessitated the range of deviations between legislative districts which is evident here" (386 U. S., at 123, 87 S. Ct. at 822, 17 L. Ed. 2d at 775). In fact, the Court noted, there were two other plans, prepared upon the very thesis the State asserted, which "produced substantially smaller deviations from the principles of *Reynolds* v. *Sims*." (386 U. S., at 124, 87 S. Ct. at 823, 17 L. Ed. 2d at 775).

[3, 4] Thus it cannot be said that the ratio of 1.5 to 1 authorized by our State Constitution is inherently bad.

But we stress again, as we did in *Jones* v. *Falcey*, 48 N. J. 25, 37 (1966), that there is no range of deviation "within which a State may maneuver, with or without reason"; that "the command is to achieve equality, and a limited deviation is permissible only if there exists an acceptable reason for the deviation"; and "the deviation may not exceed what the purpose inevitably requires." And when a deviation does appear, the burden is the State's to justify it. 48 N. J., at 40. In short, there must be selected the best plan the constitutional thesis will permit, and the best plan is the one with the least population deviation. *Koziol* v. *Burkhardt*, 51 N. J. 412, 416 (1968). *Jones* and *Koziol* involved congressional districting, but these principles are equally pertinent to state legislative districting. *Jackman* v. *Bodine*, *supra*, 49 N. J., at 415, 418. See *Swann*, *supra*, 385 U. S., at 445, 87 S. Ct. 569, 17 L. Ed. 2d, at 505; *Kilgarlin*, *supra*, 386 U. S., at 123-124, 87 S. Ct. 820, 17 L. Ed. 2d, at 775.

[5] A subsidiary question with respect to districting is whether adherence to ward lines can justify any mathematical departure from equality. The issue was raised with respect to the Assembly lines drawn in the Senate district comprising Hudson County. We are satisfied that the municipal ward, although conceivably useful with respect to the problem of gerrymandering, does not for that reason, or for any other reason, advance the purposes of apportionment sufficiently to justify population inequality, and hence, with respect to future elections, no deviation will be defensible on that account.

[6] We add that we adhere to the view we heretofore expressed that assemblymen must be allocated to the Senate districts on the principle of equal proportion notwithstanding the provision of Art. IV, § II, par. 3, that assemblymen be allocated on the basis of two for each senator

allotted to such districts. See *Jackman, supra*, 49 N. J., at 416-418; *Jackman, supra*, 50 N. J., at 129-130. The alternative, as there pointed out, could be to give one county an assemblyman at the expense of another county and thereby to accentuate an imbalance in the Senate. Under our decision an odd number of assemblymen may be allotted to a Senate district. When this is so, one or more may have to run at large within the Senate district. We see no affront in that situation to the requirement for voter equality.

IV

Another matter should be discussed even though we can only await further developments with respect to it.

We refer to the multi-member district, which will probably continue to be a feature of future plans under our State Constitution. The election of all the allotted senators by all the voters of the single county obviously serves the thesis of adhering to county lines. Nonetheless the criticism is made that the individual in such a county has a stronger voice within the legislative hall because he has multiple representatives.

There is another aspect. An election at large within the multi-member districts means the majority wins all whereas if there were subdistricts, a minority group might elect a senator. That the majority may win all seats does not run against the ideal of one-man one-vote. As we pointed out in I above, that ideal is achieved by elections at large and therefore is furthered with respect to all voters within a multi-member district if each vote is pitted against every other vote throughout the district. Hence the question seems to be, not whether in this respect the multi-member district denies the principle of one-man one-

vote, but whether such districting generates other inequalities equally violative of the equal protection clause.

[7] The drawing of district lines with the affirmative intention to disadvantage a minority interest would deny equal protection. Realistically, however, it is difficult to prove the presence of such a purpose. It more likely will appear only that single-member districts would or might enable a minority group to elect someone. Thus the question emerges whether the Constitution affirmatively requires single-member districts to the end that minorities will have the maximum chance to elect their own representatives. And this question arises whether the multi-member district consists of several counties[6] or of only one.

[8] We assume a legislature may not be apportioned on racial, religious, national, ethnic, or economic lines, *i.e.*, by allotting a *pro rata* number of representatives to each identifiable group to be elected exclusively by the voters of that group no matter where they reside. Apart from the impossibility of recognizing all such conceivable interests, an apportionment upon that basis would run against the central concept of *Reynolds* v. *Sims* that the apportionment of population shall be made only in terms of geography, with no notice whatever of constituencies beyond their numerical count. Of course in practical politics minority interests nonetheless have a voice, for obviously in the selection of a slate a political party cannot be indifferent to a minority, at least if its members are sufficiently numerous. But the question is whether the

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[6] Under our Constitution, senators run in Assembly districts in that situation. Art. IV, §II, par. 2; *Jackman* v. *Bodine*, *supra*, 49 N. J. at 415-416.

equal protection clause requires single-member districts to insure the maximum chance of election by minorities, and so requires even though such districting may benefit only a minority which is concentrated geographically and even though the value of the votes of others within the district who are not members of that minority may thereby be effectively nullified.

[9] At the moment, the multi-member district, as such, cannot be said to be invalid under decisions of the United States Supreme Court. But the subject is far from settled. While *Fortson* v. *Dorsey*, 379 U. S. 433, 439, 85 S. Ct. 498, 13 L. Ed. 2d 401, 405 (1963), upheld such districting, it added that "It might well be that designedly *or otherwise*, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster" (emphasis added). See particularly *Charis* v. *Whitcomb*, 305 F. Supp. 1364 (S. D. Ind., July 28, 1969), and *Mann* v. *Davis*, 245 F. Supp. 241, at 245-246 (E. D. Va. 1965), aff'd without opinion, *sub. nom. Burnette* v. *Davis*, 382 U. S. 42, 86 S. Ct. 181, 15 L. Ed. 2d 35 (1965); and see also *Burns* v. *Richardson*, 384 U. S. 73, 88, 86 S. Ct. 1286, 16 L. Ed. 2d 276, 388 (1966); *Kilgarlin* v. *Hill*, *supra*, 386 U. S. at 125, n. 3, 87 S. Ct. 820, 17 L. Ed. 2d, at 776, n. 3; *Davis* v. *Cameron*, 238 F. Supp. 462, 466 (S. D. Iowa 1965); *Buckley* v. *Hoff*, 243 F. Supp. 873, 878 (D. Vt. 1965); *Stout* v. *Bottorff*, 246 F. Supp. 825, 829 (S. D. Ind. 1965); *Baker* v. *Carr*, 247 F. Supp. 629, 637-638 (M. D. Tenn. 1965); *Abate* v. *Mundt*, *supra*, 25 N. Y. 2d at 316-317, 305 N. Y. S. 2d 465, 253 N. E. 2d, at 192-

193, cert. granted 396 U. S. ——, 90 S. Ct. 929, 24 L. Ed. 2d —— (Feb. 24, 1970); Banzhaf, "Multi-Member Electoral Districts—Do They Violate the 'One Man, One Vote' Principle," 75 Yale L. J. 1309 (1966); "Reapportionment," 79 Harv. L. Rev. 1226, 1258-1261 (1966); Dixon and Hathaway, "The Seminal Issue in State Constitutional Revision: Reapportionment Method and Standards," 10 William and Mary L. Rev. 888, 903-904 (1969).

The multi-member district issue is quite distant from the issue generated by the crazy quilt of unequal districts which led to *Asbury Park Press, Inc.* v. *Woolley*, 33 N. J. 1 (1960), and *Baker* v. *Carr*, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). It may not be difficult to decide whether an apportionment scheme is irrational or is indifferent to an explicit apportionment command of a Constitution. There are known standards of reference for such a decision. The issue as to the validity of a multi-member district is stringly different. The question is really whether the equal protection clause provides an affirmative design of a democratic government, and if so, whether that design demands single-member districts. Until the United States Supreme Court speaks, there will be no dependable standard of reference. The question goes to the essence of the State Constitution's apportionment plan,[7] and since the United States Supreme Court has expressly reserved the matter for future consideration, we

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[7] As to the Senate, the Constitution expressly calls for elections at large within a district consisting of a single county. Since 40 Senators are to be elected from 21 counties, it is likely there will be such districts in future plans. The multi-member issue may also be involved with respect to Assembly districts, since our Constitution calls for the election of *two* Assemblymen from each district.

think it unwise and perhaps needlessly disruptive for us to anticipate its answer.

Subject to the qualifications stated in this opinion, the State Constitution's apportionment plan is adjudged to be valid with respect to the several challenges considered herein.

For affirmance—Chief Justice Weinstein and Justices Jacobs, Francis, Proctor, Hall, Schettino and Hancman—7.

For reversal—None.

APPENDIX B

New Jersey Assembly District Populations 1968-1969 and 1970-1971

1968-1969 Districts

1. *District*	2. *Population*[11]	3. *No. of Assemblyman*	4. *% of Rel. Dev. from State "Ideal"*[3]	5. *% of Rel. Dev. from Sen. Dist. "Ideal"*[8]
1	155,405	2	+ 2.46	0.00
2	160,880	2	+ 6.07	0.00
3A	146,390	2	— 3.48	—0.00
B	146,293	2	— 3.54	—0.07
C	146,492	2	— 3.41	+0.07
D	146,411	2	— 3.46	+0.01
4A	166,366	2	+ 9.69	—0.00
B	166,374	2	+ 9.70	+0.00
5A	167,673	2	+10.55	+0.28
B	166,728	2	+ 9.93	—0.28
6A	125,597	2	—17.19	—5.71
B	140,795	2	— 7.17	+5.71
7A	140,508	2	— 7.36	—2.84
B	147,571	2	— 2.70	+2.04
C	145,777	2	— 3.89	+0.80
8	143,913	2	— 5.11	0.00
9A	168,661	2[9]	— 4.68[4]	+0.34
B	168,930	2[9]	— 4.53[4]	+0.50

Appendix B

1968-1969 Districts

1. *District*	2. *Population*[11]	3. *No. of Assemblyman*	4. *% of Rel. Dev. from State "Ideal"*[13]	5. *% of Rel. Dev. from Sen. Dist. "Ideal"*[18]
C	166,664	2[1]	— 5.81[4]	—0.84
10A	131,629	2	—13.21	+0.62
B	129,991	2	—14.29	—0.62
11A	160,040	2	+ 5.52	+3.97
B	162,884	2	+ 7.39	+5.82
C	146,814	2	+ 3.20	—4.62
D	152,943	2	+ 0.84	—0.64
E	147,490	2	— 2.75	—4.18
F	153,374	2	+ 1.12	—0.36
12A	167,089	2	+10.17	+9.43
B	139,767	2	— 7.85	—8.46
C	146,070	2	— 3.69	—4.33
D	157,808	2	+ 4.05	+3.36
13A	156,943	2	+ 3.48	+0.57
B	155,139	2	+ 2.29	—0.58
C	156,734	2	+ 3.34	+0.44
D	155,001	2	+ 2.20	—0.67
E	156,438	2	+ 3.14	+0.25
14A	136,047	1[2]	+ 7.64[5]	+0.37
B	143,663	1[2]	+13.67[5]	+6.00
C	126,908	1[2]	+ 0.41[5]	—6.37
15	166,582	2	+ 9.83	0.00
	6,066,782	80	6.02[19]	2.03[19]

Appendix B

1970-1974 DISTRICTS

District	6. *Population*	7. *No. of Assemblymen*	8. *% of Rel. Dev. from State "Ideal"*	9. *% of Rel. Dev. from Sen. Dist. "Ideal"*[1]
1	155,405	2	+ 2.46	0.00
2	160,880	2	+ 6.07	0.00
3A	146,392	2	— 3.48	—0.00
B	146,391	2	— 3.48	—0.00
C	146,392	2	— 3.48	—0.00
D	146,411	2	— 3.47	+0.01
4A	166,370	2	+ 9.70	0.00
B	166,370	2	+ 9.70	0.00
5A	167,201	2	+10.24	+0.00
B	167,200	2	+10.24	—0.00
6A	138,560	2	— 8.64	+4.03
B	127,832	2	—15.71	—4.03
7A	143,985	2	— 5.07	—0.44
B	144,094	2	— 3.99	—0.36
C	145,777	2	— 3.88	+0.80
8	143,913	2	— 5.11	0.00
9A	168,554	2	— 4.74[6]	+0.28
B	167,784	2	— 5.18[6]	—0.18
C	167,917	2	— 5.10[6]	+0.10
10A	130,810	2	—13.75	0.00
B	130,810	2	—13.75	0.00
11A	160,293	2	+ 5.69	+4.14
B	162,631	2	+ 7.23	+5.66
C	146,814	2	— 3.20	—4.62

Appendix B

1970-1971 Districts

District	6. *Population*	7. *No. of Assemblymen*	8. *% of Rel. Dev. from State "Ideal"*	9. *% of Rel. Dev. from Sen. Dist. "Ideal"*
D	153,623	2	+ 1.29	—0.20
E	149,372	2	— 1.51	—2.96
F	150,812	2	— 0.57	—2.02
12A	165,802	2	+ 9.32	+8.59
B	145,298	2	— 4.20	—4.84
C	153,341	2	+ 1.10	+0.43
D	146,293	2	— 3.54	—4.19
13A	156,048	2	+ 2.89	—0.00
B	156,047	2	+ 2.89	—0.00
C	156,053	2	+ 2.89	+0.00
D	156,073	2	+ 2.90	+0.01
E	156,034	2	+ 2.88	—0.01
14A	197,285	2	+ 4.06[7]	—2.96
B	209,333	2	+10.42[7]	+2.96
C	———	—	———	———
15	166,582	2	+ 9.83	0.00
	6,066,782	80	5.76[10]	1.38[10]

Appendix B

[1] One additional assemblyman elected at-large from Senate district.

[2] Two additional assemblymen elected at-large from Senate district.

[3] Column 2 ÷ State-wide "ideal" Assembly district population (i.e. State population ÷ 40 = 6,066,782 ÷ 40 = 151,669.55).

[4] Column 2 ÷ 7/6 of State-wide "ideal" Assembly district population (i.e., 176,947.8).

[5] Column 2 ÷ 5/6 of State-wide "ideal" Assembly district population (i.e., 126,391.3).

[6] Column 6 ÷ 7/6 of State-wide "ideal" Assembly district population (i.e., 176,947.8).

[7] Column 6 ÷ 5/4 of State-wide "ideal" Assembly district population (i.e., 189,568.9).

[8] Column 2 ÷ Senate-district-wide "ideal" Assembly district population (i.e., Senate district population ÷ number of Assembly districts in Senate district).

[9] Column 6 ÷ Senate-district-wide "ideal" Assembly district population.

[10] Mean % of relative deviation (i.e., sum of deviations, ignoring signs, in column divided by number of deviations).

[11] 1960 Federal census.

APPENDIX C

Statistical Appendix on Behalf of the State of New Jersey to Supplemental Brief for the Apportionment Commission

SUPREME COURT OF NEW JERSEY

DOCKET. NO. A-139 SEPTEMBER TERM 1968.

ALSO DOCKET NO. 6522

CHRISTOPHER JACKMAN, *et al.*,

Plaintiffs-Appellants,

v.

JOHN M. BODINE, *et al.*,

Defendants-Respondents.

INTRODUCTION

The Supplemental Brief on behalf of the Apportionment Commission argues for a determination of the validity of the districting plan on its face; and against the result orientation of the "numbers game." In fact, the actual result cannot be known at the time of argument, nor until the 1970 Census is promulgated.

The process of the evaluation of a plan; however, may well suggest the necessity of some experimentation with its possible or likely effect, given reasonable assumptions as to the results of the Federal Census. In order to satisfy the need for data for such an inquiry, the fol-

Appendix C

lowing Tables have been prepared, at the request of Counsel, by Samuel A. Alito, Research Director of the Division of Legislative Information and Research, using estimates of population prepared by the Bureau of Research and Statistics of the New Jersey Department of Conservation and Economic Development.

In addition, for purposes of comparison the actual current apportionment of members of the House of Representatives of the United States is set forth in Table A. The purpose of this comparison is to show the average deviation in population per Congressman among the States as a guide to the fairness of the average deviation in population per Senator among the Senate Districts.

The Supplemental Brief for the Apportionment Commission, at Page 5, refers to the report of the Committee on Apportionment of the American Political Science Association, which recommended a maximum deviation in population per Representative of 15% and a desirable deviation of not more than 10%. In this context, Sheets 1 through 17 in Table C are limited to possible Senate District maps in which each Senate District has a deviation from the mean state-wide population per Senator of less than ± 10%. In addition, the maps contain no Senate District with more than three Counties, and in all maps (Sheets 1 through 17, Table C), the Counties of Hudson, Essex, and Bergen each constitute a separate Senate District.

It is submitted that the best of these Senate District maps satisfy the requirements of fair representation from the viewpoints of both law and political science. See Robert G. Dixon, Jr., Reapportionment Prospectives: "What Is Fair Representation?," 51 *Am. Bar Assoc. Jour.* 319, at 328 (April 1965); Robert B. McKay, *Reapportion-*

Appendix C

ment: The Law and Politics of Equal Representation (New York 1965) at p. 270. Dean McKay, in the work cited, summarizes his recommendations as follows:

> "4. Standards to govern apportionment and districting should include the following:
>
> a. Each district should be nearly equal in population as practicable.
>
> b. Each district should be composed of as compact and contiguous an area as practicable.
>
> c. To the extent practicable and consistent with the foregoing standards, local political subdivision lines should be followed.
>
> d. Districts should be drawn without respect to the strength of any political party as reflected by enrollment, votes for candidates in any election, or any similar criteria."

Table C

(Demonstrations of Alternate Senate Districts Using Estimated 1970 County Populations)

[PHOTOSTATS]

(Opposite) ☛

DEMONSTRATIONS OF ALTERNATIVE SENATE DISTRICTS USING ESTIMATED 1970 COUNTY POPULATIONS

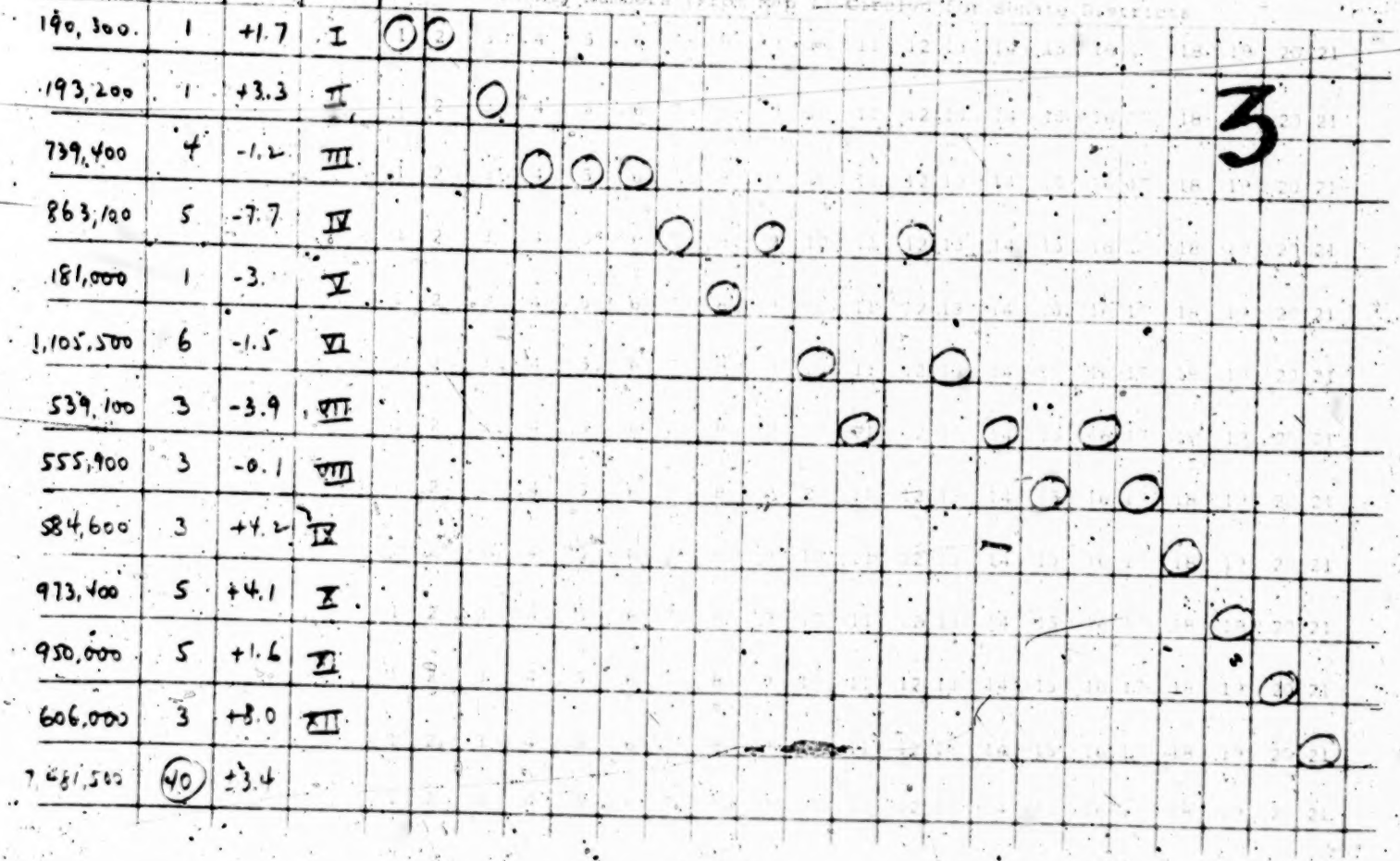
Dist. Pop.	No. of Sen.	% of Dev.	Dist. No.	County Numbers (From Map I) Circled for Senate Districts
190,300	1	+1.7	I	(1) (2) 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21
193,200	1	+3.3	II	1 2 (3) 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21
739,400	4	-1.2	III	1 2 3 (4) (5) (6) 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21
514,000	3	-8.4	IV	1 2 3 4 5 6 (7) (8) 9 10 11 12 13 14 15 16 17 18 19 20 21
530,100	3	-5.5	V	1 2 3 4 5 6 7 8 (9) 10 11 (12) 13 14 15 16 17 18 19 20 21
1,105,500	6	-1.5	VI	1 2 3 4 5 6 7 8 (9) 10 11 (12) (13) 14 15 16 17 18 19 20 21
539,100	3	-3.9	VII	1 2 3 4 5 6 7 8 9 10 (11) 12 13 (14) 15 (16) 17 18 19 20 21
555,900	3	-0.1	VIII	1 2 3 4 5 6 7 8 9 10 11 12 13 14 (15) 16 (17) 18 19 20 21
584,600	3	+4.2	IX	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 (18) 19 20 21
973,400	5	+4.1	X	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 (19) 20 21
950,000	5	+1.6	XI	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 (20) 21
606,000	3	+8.0	XII	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 (21)
7,481,500	(40)	±3.4		1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21

1

CONFIGURATIONS OF ALTERNATIVE SENATE DISTRICTS USING
ESTIMATED 1970 COUNTY POPULATIONS

Dist. Pop.	No. of Sen.	% of Dev.	Dist. No.	County Numbers (From Map 1) Circled for Senate Districts
190,300	1	+1.7	I	1 2
193,200	1	+3.3	II	3
739,400	4	-1.2	III	4 5 6
728,400	4	-2.6	IV	7 9 11
181,000	1	-3.2	V	8
1,105,500	6	-1.5	VI	10 13
673,800	4	-9.9	VII	12 14 15 16
555,900	3	-0.1	VIII	17 18 19
584,600	3	+4.2	IX	20
973,400	5	+4.1	X	21
950,000	5	+1.6	XI	
606,000	3	+8.0	XII	
7,481,500	40	±3.4		

Dist. Pop.	No. of Sen.	% of Dem.	Dist. No.
190,300.	1	+1.7	I
193,200	1	+3.3	II
739,400	4	-1.2	III
863,100	5	-7.7	IV
181,000	1	-3.	V
1,105,500	6	-1.5	VI
539,100	3	-3.9	VII
555,900	3	-0.1	VIII
584,600	3	+4.2	IX
973,400	5	+4.1	X
950,000	5	+1.6	XI
606,000	3	+3.0	XII
7,681,500	(40)	±3.4	



REPRESENTATIVE SENATE DISTRICTS USING
ESTIMATED [illegible] COUNTY POPULATIONS

Dist. Pop.	No. of Sen.	% of Dev.	Dist. No.
190,300	1	+1.7	I
193,200	1	+3.3	II
739,400	4	-1.2	III
1,438,500	8	-3.9	IV
181,000	1	-3.2	V
530,100	3	-5.5	VI
539,100	3	-3.9	VII
555,900	3	-0.1	VIII
584,600	3	+4.2	IX
973,400	5	+4.1	X
950,000	5	+1.6	XI
606,000	3	+8.0	XII
7,481,500	(40)	±3.4	

"County Numbers" (From Map 1) Circled for Senate Districts

4

72,700
15
483,200
17
930,000
20
76,700
14
16
390,100
19
973,400
2
600,000
207,000
12
72,300
11
13
622,000
9
323,100
10
483,500
8
181,000
7
333,000
490,800
6
5
178,200
4
70,400
3
193,200
2
133,300
1
57,000
7,481,500
STATE TOTAL

APPENDIX D

Affidavit of James B. Weaver

STATE OF DELAWARE
NEW CASTLE COUNTY, WILMINGTON, DELAWARE } ss.:

I, James Weaver, being duly sworn hereby depose and state as follows:

(1) I am a Founding Member and Director of CROND, Incorporated, and the senior author of the report, "Computer-Based Districts for the Delaware Legislature," May 1, 1968, which has been made available to the Court.

(2) Exhibits B1, B2, and L3 of that report contain additional information concernind CROND, Incorporated, my background, and our qualifications to perform legislative districting on a nonpartisan basis being a computer.

(3) The text of that report accurately represents our contract with the Delaware Legislature and our performance under that contract to prepare legislative districts for the Delaware House of Representatives and Senate, according to criteria established by a bipartisan committee of that Legislature.

(4) The extent of statewide population deviation among the Delaware legislative districts prepared on the computer was basically established by the Legislature's restriction that CROND, Incorporated retain county boundaries and the boundary of the City of Wilmington. Using enumeration districts from the Special Census of 1967, our computer districting within the county apportionment added only about (1) percentage point of devia-

tion to the deviations caused by the county apportionment. If CROND, Incorporated, had been asked to prepare districts without regard to county or city boundaries, we believe maximum population deviation could have been held within 1% to 3% of the average, without altering the principles of compactness included in our computer program. Within the counties and Wilmington, actual deviations from the average preferred in our plans were as follows:

Wilmington (Representative Plan)	−0.8%
New Castle County (Representative Plan)	+3.4%
New Castle County (Senatorial Plan)	+1.8%
Kent County (Representative Plan)	+1.9%
Sussex County (Representative Plan)	+1.4%

(5) The CROND Program and instructions for its use are publicly available through the National Municipal League, 47 East 68th Street, New York, New York 10021. All activities and publications of CROND are for general use and can be applied by any competent expert in the computer field. Since members of CROND all have full-time jobs in other fields and have undertaken CROND as a nonprofit civic activity, ~~we~~ will consider acting as consultant for any nonpartisan districting activity. We will also consider undertaking additional contracts like that with the Delaware Legislature, but have no interest in undertaking a great number of such contracts, now that one computer-based plan has been implemented.

(6) To make available for our research and possible implementation the most applicable 1960 population figures and geographic coordinates gathered by the U. S.

Appendix D

Bureau of the Census. CROND, Inc., purchased in 1966 from the U. S. Bureau of the Census computer tapes representing Census Tracts and other Standard Location Areas for all of the United States, together with the geographic coordinates of approximate population centers in each of those areas. This information has been used in research, but was not applicable for our Delaware contract. Additional programs (also available at reproduction cost from CROND) make it possible to reproduce this data in the format needed by CROND's districting programs. Duplicate information could be purchased from the Census Bureau, where it is publicly available at reproduction cost. The intervening programs to simplify its use are not available from the Census Bureau.

(7) Data on that tape for the State of New Jersey divides its 1960 population of 6,066,782, throughout the 21 counties, into 1250 Standard Location Areas. The average population of these units is, therefore, about 4,850 people, but the range is extreme, from under 1,000 people to as many as 39,675 in one population unit in Monmouth County. Only four (4) other SLA's include population over 20,000, and only five (5) more are above 15,000. Our experience working with such a range of units and population indicate that the larger units will cause no significant problems in achieving low population deviation, close to the average to be expected, which is about half the average size unit out of a total district. To divide this 1960 population into 40 assembly districts gives an average population of 151,695 people per district. We would expect deviations generally below 2%, therefore, using this size population unit, in each assembly district. Maximum deviation should not run beyond about 5% from the ideal.

Appendix D

(8) The computer program used by CROND in the Delaware contract may not be large enough to solve the entire New Jersey problem in the terms described above for 40 assembly districts using 1250 population units. Several alternatives are available, any one of which seems very likely to permit solution of the 1250x40 problem:

— The program could be recast for larger computers than any used to date. An IBM 360 Model 65 or 67 could be used if 320,000 bytes of memory, or more, were fully available for this use (no time sharing).

— Available equipment is big enough to run a problem about half the size of New Jersey (1250x20). The Univac 1107 or 1108 might be adequate if one is available with 65,000 words of memory. County populations could be studied to find groupings of contiguous counties extremely close to a multiple of the ideal population per district, so that smaller problems could be solved without significantly increasing the population deviation of legislative districts. Alternatively, the computer program is big enough to divide the state in half (1250x2), and then each half of the state, not fitting county boundaries, could be handled on available equipment as a 1250x20 problem. Even this alternative may surpass the capacity of available equipment, but the number of population units can be reduced sufficiently to permit this technique of solution, by combining enclaves and corners of the state, like Cape May County, into single population units since they would certainly be within the same legislative district.

Appendix D

(9) Population deviations could be reduced by studying U. S. Census Bureau enumeration districts on the borders of the legislative districts found by the above process. Geographic coordinates of such districts are not easily available so they cannot be promptly processed by computer without delays. However, the population equality can be significantly improved by hand use of such enumeration district data.

(10) CROND has collected other computer programs suitable for legislative districting from various sources, during our research. Two of these are possibly more applicable to problems the size of New Jersey than the basic CROND Program which was used in Delaware. These programs use different concepts of compactness from the Delaware Program, and CROND is less familiar with their flexibility, but we are equally willing to consider their use of consult with other computer facilities to assist in their use. We are less familiar with costs of running times, so we do not feel competent to make estimates like those in the following paragraph.

(11) CROND or other capable computer service facilities should be able to use the REDIST Program and the available census tract 1960 population data to process and map districting plans for New Jersey for costs comparable to those shown in the Delaware report. Computer costs would be perhaps $100 per alternative plan, and all costs including supervision and mapping should not be more than $5,000 per alternative plan desired. This assumes no attention is paid to county boundaries so separate plans for separate areas within New Jersey would not be a requirement. This estimate assumes current commercial rates.

Appendix D

(12) A competent computer service facility should be able to prepare several alternatives within a matter of weeks. A closer time estimate is not possible until appropriate computer facilities are chosen and the organization to carry out this work is established. CROND cannot volunteer to undertake this project on its own at these estimated costs without further consideration of a more definite proposal.

Original Signed By
J. B. WEAVER
James B. Weaver

SWORN and SUBSCRIBED to before me the day and year first above written, April 17, 1969

/s/ ROBERT A. KANE, JR.
Notary Public

JUL 1 1970
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. [redacted] 200

CHRISTOPHER JACKMAN, *et al.*,

—v.—

JOHN M. BODINE, *et al.*

THE ELIZABETH DAILY JOURNAL, *et al.*,

—v.—

ROBERT J. BURKHARDT, *et al.*

STATEMENT ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY ON BEHALF OF THE SPEAKER OF THE GENERAL ASSEMBLY OF NEW JERSEY

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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

PAGE

STATEMENT ON BEHALF OF SPEAKER OF THE GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY 1

Cases Cited

Jackman v. Bodine, 55 N. J. 371, 262 A. 2d 389 (1970) 2

Jackman v. Bodine, 53 N. J. 585, 252 A. 2d 209 (1969), cert. den., 395 U. S. 918 (1969) 3

Jackman v. Bodine, 49 N. J. 406, 231 A. 2d 193 (1967) 2

Jackman v. Bodine, 43 N. J. 453, 205 A. 2d 713 (1964) 2

Jones v. Falcey, 48 N. J. 25, 222 A. 2d 101 (1966) 3

Kirkpatrick v. Preisler, 394 U. S. 526 (1969) 4

Koziol v. Burkhardt, 51 N. J. 412, 241 A. 2d 451 (1968) 3

Reynolds v. Sims, 377 U. S. 553 (1964) 2

Wells v. Rockerfeller, 394 U. S. 542 (1969) 4

Other Authority Cited

Dixon, Democratic Representation (1968) 4

IN THE

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OCTOBER TERM, 1969

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CHRISTOPHER JACKMAN, *et al.*,

—v.—

JOHN M. BODINE, *et al.*

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—v.—

ROBERT J. BURKHARDT, *et al.*

STATEMENT ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY ON BEHALF OF THE SPEAKER OF THE GENERAL ASSEMBLY OF NEW JERSEY

Statement on Behalf of Speaker of the General Assembly of the State of New Jersey

This statement is directed to a petition for writ of certiorari brought by certain petitioners against a decision

of the New Jersey Supreme Court entered on March 20, 1970 in *Jackman* v. *Bodine*, 55 N. J. 371, 262 A. 2d 389 (1970). This decision involved the districting and apportionment of the New Jersey legislature. The basis for jurisdiction, and a general statement of the case are adequately outlined in petitioners' brief.

This opinion of the New Jersey Supreme Court is the latest of a series of decisions involving New Jersey's attempts to reapportion and redistrict itself in accordance with the principle of one man—one vote. The State of New Jersey had somewhat anticipated the concepts which were enunciated in *Reynolds* v. *Sims*, 377 U. S. 533 (1964), and its companion decisions. In 1964 when these landmark opinions were decided, there was pending before the New Jersey Supreme Court an action entitled *Jackman* v. *Bodine*, which was decided by the New Jersey Supreme Court shortly after *Reynolds* v. *Sims*, and which applied the one man—one vote doctrine as interpreted by the New Jersey Supreme Court in the light of precedents established by the United States Supreme Court. *Jackman* v. *Bodine*, 43 N. J. 453, 205 A. 2d 713 (1964). The New Jersey Supreme Court recognized that the decisions of the United States Supreme Court in *Reynolds* v. *Sims*, *supra* and its related cases did not establish the final dimension of one man—one vote. Therefore, the New Jersey Supreme Court specifically reserved jurisdiction over further questions relating to legislative apportionment and districting, and it invited direct application to the New Jersey Supreme Court on future questions relating to this subject.

The control which the New Jersey Supreme Court retained on questions of proper apportionment and districting brought it into direct involvement in a number of decisions. See, *e.g.*, *Jackman* v. *Bodine*, 49 N. J. 406, 231 A. 2d 193 (1967), (ordered some restructuring of

State legislative districts), *Jackman* v. *Bodine*, 53 N. J. 585, 252 A. 2d 290 (1969), *cert. den.*, 395 U. S. 918 (1969), (ordered restructuring of State Assembly districts), *Jones* v. *Falcey*, 48 N. J. 25, 222 A. 2d 101 (1966), (approved Congressional districting), *Kozial* v. *Burkhardt*, 51 N. J. 412, 241 A. 2d 451 (1968); (approved legislative rearrangement of two Congressional districts). With the exception of *Jackman* v. *Bodine*, 53 N. J. 585, 252 A. 2d 209 (1969), *cert. den.*; 395 U. S. 918 (1969) none of the New Jersey Supreme Court decisions on apportionment and districting have been presented to the United States Supreme Court for its consideration.

Legislative apportionment and districting in New Jersey has to comply with the one man—one vote principle of the Fourteenth Amendment to the United States Constitution. The State's apportionment and districting scheme is derived from an amendment to the New Jersey Constitution which was recommended to its citizens by the bipartisan Constitutional Convention of 1966. It was duly adopted by the voters in November of that year. Parts of this 1966 constitutional amendment are quoted by petitioners under the "Constitutional and Statutory Provisions Involved" section of their brief. In addition to the quoted section the 1966 Amendment enacted Section III which established a bipartisan Apportionment Commission to carry out decennial legislative reapportionment and redistricting in New Jersey. Under the New Jersey Constitution the legislature must be reapportioned following each Federal decennial census. It is anticipated that the complete legislature will be reapportioned and redistricted in time for general elections to be held in November of 1971.

The New Jersey legislative apportionment and districting constitutional provisions are unique in that they provide an objective formula for regular legislative restruc-

turing. One commentator has called the New Jersey system "superior". Dixon, *Democratic Representation*, 339 (1968). In the past this Court has passed upon a number of legislative apportionment and districting schemes which were derived on an *ad hoc* basis solely for the purpose of a specific election. The New Jersey constitutional provisions purport to establish a formula which may be applied on an objective basis by the Apportionment Commission after each future decennial census.

It is submitted that the New Jersey legislative apportionment and districting plan complies with the one man—one vote concept, as the New Jersey Supreme Court has held during its past decisions involving various aspects of the application of the constitutional formula. However, it must be recognized that the New Jersey legislative apportionment and districting formula sanctions districts which may be as much as 20% above or below the State-wide population norm. Thus, the New Jersey Constitution authorizes a maximum deviation between districts which could be as high as 1.5:1 without requiring a complete restructuring or reapportionment of the State's legislative districts. (This significant fact has been noted in petitioners' brief at pages 5, 8, 10 and 16.)

We must acknowledge that the possible range of population deviations under the New Jersey constitutional formula is larger than actual population deviations which were struck down by this Court in *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969) and *Wells* v. *Rockefeller*, 394 U. S. 542 (1969). However, it must also be recognized that this 20% maximum permitted population deviation under the Constitution is merely an outside limit within which the New Jersey formula may be applied without requiring a complete restructuring of legislative districts. It is not a maneuvering room within which the Apportionment Commission may draw district lines at will. All internal district lines must be drawn so as to result in the least

population deviation possible among legislative districts. This is a vital distinction between legislative apportionment and districting plans resulting from the application of the New Jersey formula and those plans which this Court has considered in the past which resulted from an *ad hoc* delineation of districts without any reference to any specific pre-established formula.

It is submitted that this Court will concur with the decisions of the New Jersey Supreme Court which have held that the New Jersey legislative apportionment formula complies with the one man—one vote mandate of the Fourteenth Amendment to the United States Constitution. The Speaker of the General Assembly of the State of New Jersey submits that there is no need for this Court to grant the writ of certiorari which has been applied for by petitioners. However, the Speaker also recognizes that there are serious unanswered Constitutional questions which underlie the New Jersey formula for legislative reapportionment, and that new problems will undoubtedly be posed as a result of the decennial census of 1970. Thus, it may be appropriate for this Court to grant this requested writ of certiorari in order to determine unresolved issues and to pass upon formula reapportionment and redistricting as one method by which the several states may meet the practical problem of implementing legislative reapportionment and redistricting in accordance with one man—one vote.

Respectfully submitted.

Hugo M. Pealtz, Jr.,
Attorney for the Speaker of the General Assembly of New Jersey.

June 28, 1970.